Supreme Court, U.S.
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NO.

In The

Supreme Court of the United States

October Term, 1996

BENJAMIN BARRY KRAMER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PROTECTS A DEFENDANT AGAINST SUCCESSIVE CONVICTIONS FOR CCE, RICO AND THE TRAVEL ACT BASED UPON THE SAME PREDICATE VIOLATIONS UNDER THE COURT'S LESSER INCLUDED OFFENSE DOCTRINE AND WHETHER THE COURT'S 1993 DECISION IN UNITED STATES V. DIXON HAS OVERRULED GARRETT V. UNITED STATES?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings:

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The City of Bell Gardens, CA
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OPINION BELOW

The January 16, 1996, opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. Kramer*, 73 F.3d 1067 (11th Cir. 1996). A copy of the decision in *Kramer* is attached hereto as **APPENDIX A.**

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Kramer* was filed on January 16, 1996. The Eleventh Circuit entered its judgment against Petitioner, following the denial of rehearing, on July 18, 1996. *See* **APPENDIX B**. This petition for a writ of certiorari follows within 90 days of the latter date. *See* Supreme Court Rules, Rule 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. CONST., AMEND. V.

STATEMENT OF THE CASE

A. Procedural History

On August 26, 1987, a two-count indictment was returned against the Petitioner, BENJAMIN BARRY KRAMER, in the United States District Court for the Southern District of Illinois, charging Kramer and others with conducting a Continuing Criminal Enterprise ("CCE") in violation of 21 U.S.C. § 848(a), and with conspiring to distribute marijuana in violation of 21 U.S.C. § 846. On January 26, 1988, the government returned a superseding indictment, also in the Southern District of Illinois. (R4-177-3.) The superseding

indictment (hereinafter "KRAMER I") included the same two charges but amended the CCE count to charge Kramer under 21 U.S.C. § 848(b), an offense carrying a mandatory sentence of life imprisonment without possibility of parole.

Count 1, the CCE count, charged Kramer with committing a "continuing series" of Title 21 "violations" which included both *substantive* importations, possessions and distributions of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 952(a), 960, as well as the *conspiracy* to do so, in violation of 21 U.S.C. § 846. The latter "violation" was then separately charged in Count 2. The CCE charge specifically set forth, in subparagraphs (A)-(R), the various substantive Title 21 crimes which constituted, along with the conspiracy charge in Count 2, the "continuing series" of violations. Four of these "violations" are relevant to this Petition:

> E. In or about July 1982, BENJAMIN BARRY KRAMER ... did knowingly and intentionally import into the United States, that is Melbourne, Florida, from a place outside thereof, a controlled substance, that is approximately 15,000 pounds of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

K. In or about March or April 1983, BENJAMIN BARRY KRAMER . . . did knowingly and intentionally import in to the United States, that is New York, New York, from a place outside thereof, a controlled substance, that is approximately 130,000 pounds of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code 952(a) and 960(a)(1).

M. In or about April 1984, BENJAMIN BARRY KRAMER ... did knowingly and intentionally import into the United States, that is San Francisco, California, from a place outside thereof, a controlled substance, that is approximately 165,000 pounds of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

P. In or about April 1985, BENJAMIN BARRY KRAMER ... did knowingly and intentionally import into the United States, that is New Orleans, Louisiana, from a place outside thereof, a controlled substance, that is approximately 150,000 pounds of marijuana, a Schedule I control-

led substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

(R4-178-Exhibit B, pp. 2-3.)

While Kramer was under arrest and preventively detained in Illinois on these charges, on November 24, 1987, the government returned another indictment against Kramer (hereinafter "**KRAMER II**") in the United States District Court for the Southern District of Florida. (R4-177-3.) **KRAMER II** charged Kramer with violating and conspiring to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) and 1962(d), the Travel Act, 18 U.S.C. § 1952, various tax offenses and a violation of the same subsection of the CCE statute at issue in the original Illinois indictment, 21 U.S.C. § 848(a). (R4-177-3.)

The RICO counts in **KRAMER II** alleged that Kramer had "organized, promoted, managed and supervised [an] 'Enterprise' for the purpose of importing multi-ton loads of marijuana from Colombia, South America, into the United States." (R4-181-A-3) The RICO counts further alleged that Kramer conducted (and agreed to conduct) the illicit "Enterprise" through a pattern of criminal conduct or "racketeering activity" consisting of 46 specific crimes, four of which were identical to the CCE "violations" charged in **KRAMER I**. In particular, Racketeering Act No. 3 charged the same marijuana importation at issue in the Illinois CCE violation (E); Racketeering

Act No. 4 charged the same marijuana importation at issue in the Illinois CCE violation (K); Racketeering Act No. 5 charged the same marijuana importation at issue in the Illinois CCE violation (M); and Racketeering Act No. 6 charged the same marijuana importation at issue in the Illinois CCE violation (P). (*See* R181-A-5-6.)

Similarly, the Travel Act counts alleged that Kramer traveled and made wire transfers with the intent to either promote these same underlying narcotics activities or to distribute the proceeds of these activities. (R181-A-48-49, 51.)

The prosecutors in Florida and Illinois could not agree upon which indictment they preferred to bring to trial first. Kramer indicated that if he was allowed to enter a plea in Florida, he would plead guilty to the entire Florida indictment. (R4-178, Exhibit R, p. 3.) The Illinois prosecutors, however, opposed Kramer's suggestion, acknowledging that if Kramer pleaded guilty to the Florida charges, it "would have the effect of precluding him from being tried in the Southern District of Illinois" because of Double Jeopardy. (R4-178, Exhibit Q, at p. 3.) The Department of Justice eventually intervened and authorized the Illinois indictment to proceed to trial first. (R26-147.)

Accordingly, in June 1988, Kramer went to trial in Illinois on the charges in **KRAMER I**. The primary evidence against Kramer was elicited through the testimony of three witnesses: Charles Podesta, Jeffery Tuchband, and James Blair.

(R8-305; R14-502.) These witnesses gave extensive testimony concerning the four smuggling ventures common to the Illinois and Florida indictments, as set out above. (SR2d-646-4-5.)

On October 4, 1988, Kramer was convicted of both the CCE and conspiracy counts in **KRAMER I**. (R4-177-16.) Immediately thereafter, Kramer renewed his request for an order transferring him to Florida, at least temporarily, so that he could be arraigned. (R4-178, Exhibit T, 984.) The government again objected to any transfer prior to the completion of the Illinois case because of the conceded Double Jeopardy problem: "I think you should impose sentence with respect to his case before he's transferred from this District so that he doesn't enter a plea in some other District and have double jeopardy [sic] bar his conviction here. I think there is a significant possibility of that." (R4-178, Exhibit T, at 9848.) The district court in Illinois agreed with the government and kept Kramer in Illinois. On December 5, 1988, the court sentenced Kramer to a term of life imprisonment without possibility of parole on the CCE charge and to a concurrent term of 40 years imprisonment on the marijuana conspiracy charge. (R4-177-17-18.)

A week after the Illinois sentencing, the government obtained a superseding indictment in Florida, dropping the CCE count against Kramer. (R4-177-18.) Then, on December 14, 1988, over 12½ months after his indictment in Florida, Kramer finally was arraigned on the Florida charges in **KRAMER II**. (R22-6-7.) Kramer subsequently moved to dismiss the

RICO charges in **KRAMER II**, arguing that this second prosecution placed him jeopardy for the same crimes he already stood convicted of having committed in **KRAMER I**. (R22-10; R4-177, 183.) Kramer argued that the narcotics "violations" at issue in the Illinois CCE charge and the Section 846 conspiracy charge in Count 2 of **KRAMER I** were lesser included offenses of the RICO and Travel Act charges in **KRAMER II** and, therefore, barred Kramer's subsequent prosecution for the "greater" offenses of RICO, RICO conspiracy and Travel Act.

On October 12, 1989, Magistrate Judge Lurana Snow filed a Report and Recommendation ("R&R"), recommending that the motion be denied. (R8-316, 317.) A copy of the R&R is attached hereto as **APPENDIX C**. On December 29, 1989, the district court summarily adopted the R&R. (R10-399, 400.)

In January 1990, Kramer went to trial on the charges in **KRAMER II**. During the trial, the government called several of the same witnesses who had testified against Kramer in Illinois, including Charles Podesta, Jeffery Tuchband and James Blair. These witnesses testified about the same marijuana smuggling ventures that were the subject of the CCE charge in **KRAMER I**. (SR2-144; SR3-668; SR6-1080.) On March 28, 1990, the Florida jury returned a general verdict of guilty on all counts at issue in **KRAMER II**. (R13-474.)

On March 30, 1990, at the forfeiture proceeding following the jury's verdict, the district court *sua sponte* invited Kramer to file a post-trial motion addressing the double

jeopardy implications of the earlier prosecution in Illinois. (SR-48-10054.) The court remarked that there was "a lot of congruency" between the cases put on in Florida and Illinois, and that, but for the court having limited the government in an effort to save trial time, the two cases would have been exactly the same. (*Id.* at 10055.) The district court advised that it would hold a hearing on the matter, so that if the double jeopardy claim had merit, it could be granted "before this matter ever goes ... any further." (*Id.* at 10054.)

Pursuant to this invitation from the district court, Kramer filed a post-trial motion, and several supplements thereto, attacking his conviction on Double Jeopardy grounds. (R14-502; SR-646, 657, 668.) However, on August 29, 1990, at Kramer's sentencing the court summarily denied Kramer's post-trial motion. (SR3-691.) The court then sentenced Kramer to a 45 year term of imprisonment. (SR3-698.)

B. The Eleventh Circuit's Decision

Kramer filed a timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit. (SR3-689.) That appeal was consolidated with other appeals from both the criminal case and ancillary forfeiture proceedings. On January 16, 1996, the Eleventh Circuit summarily affirmed Kramer's conviction. *See United States v. Kramer*, 73 F.3d 1067, 1070, n. 1 (11th Cir. 1996). Kramer sought rehearing, which was denied, and the Eleventh Circuit entered its judgment against Kramer on July 18, 1996.

REASON FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN THE COURT'S 1985 DECISION IN GARRETT V. UNITED STATES AND ITS 1993 DECISION IN UNITED STATES V. DIXON CONCERNING THE APPLICATION OF THE BLOCKBURGER DOUBLE JEOPARDY TEST TO COMPLEX "UMBRELLA" CRIMES, SUCH AS CCE, RICO AND THE TRAVEL ACT.

A. General Principles

The Double Jeopardy Clause of the Fifth Amendment affords defendants three basic protections. It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction and against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). Where successive prosecutions are involved, the Clause serves "a constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971). More importantly, as the Court recognized in *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957):

> The underlying idea ... is that the [Government] with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as

> enhancing the possibility that even though innocent he may be found guilty.

Green, 355 U.S. at 187-88, 78 S.Ct. at 223-24.

The Court's Double Jeopardy decisions establish that whether or not the successive prosecution of different statutory offenses violates Double Jeopardy is governed, at least in the first instance, by the test established by the Court in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) -- *i.e.*, "whether each provision requires proof of an additional fact which the other does not." However, an exception to the *Blockburger* rule also has long been recognized to preclude successive prosecutions for "lesser-included" and "greater" offenses. Thus, when only one offense contains an "extra" element not found in the other, the latter is a lesser included offense of the former and a defendant may not be charged with both in separate proceedings. *See Illinois v. Vitale*, 447 U.S. 410, 421, 100 S.Ct. 2260, 2267, 65 L.Ed.2d 228 (1980); *Brown v. Ohio*, 432 U.S. 161, 168-69, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

In assessing whether offenses charged in succession are the same or lesser included offenses under *Blockburger*, both the elements of the offenses and the facts underlying them must be analyzed. For example, the Court has recognized that rape and robbery are both lesser included offenses of felony murder, even though felony murder can also be committed through other underlying felonies, such as arson. *See Whalen v. United States*, 445 F.2d 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980);

Harris v. Oklahoma, 433 U.S. 682, 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) (per curiam). Thus, the general rule is that "where commission of one of *a certain class* of offenses in a necessary prosecution is the factual basis of both, each offense within the class is a 'species of lesser-included offense' in relation to the greater offense." *United States v. 9844 South Titan Court, Unit 9, Littleton, Colorado*, 75 F.3d 1470, 1490 (10th Cir. 1996), quoting *Vitale*, 447 U.S. at 420, 100 S.Ct. at 2267. *Accord United States v. Sampol*, 636 F.2d 621, 652 (D.C. Cir. 1980) ("the prohibition in the Constitution against placing an accused twice in jeopardy 'for the same offense' is directed at the actual 'offense' with which he is charged and not only at the violated statutes").

B. Kramer's CCE Conviction Was a Lesser Included Offense of the Subsequent RICO and Travel Act Charges

In **KRAMER I**, Petitioner was convicted of engaging in a CCE -- an offense the Court has characterized as an inchoate, conspiracy-type offense. *See Rutledge v. United States*, ___ U.S. ___, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996). As with any conspiracy charge, one essential element of a CCE is the existence of a conspiratorial "agreement." However, that is only one element of a CCE. To prove a CCE charge, the government must also establish the existence of a "continuing series" of at least three narcotics violations -- violations which may be both inchoate conspiracies themselves *or* substantive

drug crimes. As previously discussed, in **KRAMER I** the predicate crimes included numerous substantive drug importations, including, although not limited to, violations E, K, M and P, cited above. However, since the jury in **KRAMER I** returned a general verdict, the Court must assume that the jury based this element of the CCE conviction *solely* on predicate violations E, K, M and P. *See Zant v. Stephens*, 462 U.S. 862, 881, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

General verdict principles likewise dictate the proper construction of Petitioner's RICO convictions in **KRAMER II**. The RICO and RICO conspiracy charges required the government to prove that Petitioner committed and agreed to commit a "pattern" of racketeering activity through an enterprise. *See generally United States v. Phillips*, 664 F.2d 971, 1012 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 906, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). While this "pattern," like the felony murder statutes at issue in *Harris* and *Whalen*, may theoretically include a host of crimes, the jury's general verdict requires that the Court assume that the jury found that the "pattern" in this case consisted of only racketeering acts 3, 4, 5 and 6. The same theory applies to the Travel Act counts in **KRAMER II**, since they required the jury to find that Kramer's travels and wire transfers promoted or involved the proceeds of these same predicate drug violations. Hence, under *Brown*, *Harris*, *Whalen*

and *Vitale*, the charges at issue in **KRAMER I** (CCE, its predicate substantive drug importations, and the separate drug conspiracy count), constitute lesser-included offenses of the RICO and Travel Act charges in **KRAMER II**. The RICO and Travel Act charges, prosecuted *after* Kramer was already convicted and sentenced on the CCE and related charges, violated double jeopardy because they constituted the "greater" offenses which subsumed the "lesser" offenses for which Kramer already stood convicted. *See United States v. Kragness*, 830 F.2d 842, 864 (8th Cir. 1987) (since "RICO conspiracy in fact rested upon proof of the drug conspiracies, and not upon proof of an agreement that some other predicate offenses would be committed ... we thus conclude that the offenses are the same under *Blockburger*"). *See also* Brenner, *S.C.A.R.F.A.C.E.: A Speculation on Double Jeopardy and Compound Criminal Liability*, 27 NEW ENG. L. REV. 915, 952 (1993) (hereinafter "BRENNER") (the *Blockburger* "test indicates that RICO/CCE predicates are included offenses for the same reason that predicate felonies are included in felony-murder" in *Whalen*); *United States v. Rivera-Martinez*, 931 F.2d 148, 154 (1st Cir.) (noting, as to CCE predicates, "were we to ... woodenly apply the *Blockburger* test, the argument for double jeopardy would be a powerful one"), *cert. denied*, 502 U.S. 862, 112 S.Ct. 184, 116 L.Ed.2d 145 (1991).

Prior to this Court's decision in *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.E.2d 556 (1993), courts avoided a strict application of the *Blockburger/Whalen* rule in

complex crimes, such as RICO, CCE and the Travel Act, by relying upon statutory intent. Courts examined the legislative history of such statutes and concluded that Congress intended to punish both the complex, umbrella crimes and their predicate offenses. *See United States v. Gonzalez*, 921 F.2d 1530, 1536 (11th Cir.), *cert. denied*, 502 U.S. 860, 112 S.Ct. 178, 116 L.Ed.2d 140 (1991); *United States v. Boldin*, 772 F.2d 719, 729 (11th Cir. 1985), *modified in part on other grounds*, 779 F.2d 618 (11th Cir.), *cert. denied*. 475 U.S. 1048, 106 S.Ct. 1269, 89 L.Ed.2d 577 (1986); *United States v. Walsh*, 700 F.2d 846, 856 (2d Cir.), *cert. denied*, 464 U.S. 825, 104 S.Ct. 96, 78 L.Ed.2d 102 (1983); *United States v. Kragness*, 830 F.2d at 864. As one commentator has noted:

> [T]he courts that ... applied *Blockburger* to CCE/RICO ignored [the lesser-included offense] aspect of the test because it cannot be satisfied: Predicates clearly do not require any proof that is distinct from that needed for a CCE/RICO offense, and, therefore, are lesser included offenses under *Blockburger*.... Federal courts realized that a correct application of *Blockburger* would not allow sequential prosecutions of compound offenses and their predicates, so they distorted the *Blockburger* test to achieve this result.

Brenner, 27 NEW ENG. L. REV. at 956 (1993).

Prior to *Dixon*, the Court circumvented *Blockburger* by characterizing the *Blockburger* test as simply a rule of statutory construction used to divine Congressional intent. *See, e.g.,*

Garrett v. Untied States, 471 U.S. 773, 779, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985) (permitting prosecution for CCE following prior conviction for predicate narcotics distribution, in part, because "the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history") (citations omitted); *Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) ("[w]here ... a legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial"); *United States v. Hawkins*, 658 F.2d 279, 287 (5th Cir. Unit A 1981) (characterizing *Blockburger* test as a rule of construction).

However, in *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.E.2d 556 (1993), this Court held that the *Blockburger* test was neither subservient to legislative intent nor merely a method of divining that intent. Rather, it was the primary test for determining whether the Double Jeopardy Clause itself was violated, regardless of legislative intent. In so ruling, the Court reaffirmed the holdings in *Whalen* and *Harris* and applied them to a defendant's contempt conviction based upon his subsequent commission for a drug offense.

Dixon was arrested for second-degree murder and released on bond, conditioned upon him not committing "any criminal offense." When he was later arrested for possessing

cocaine, the court held him in criminal contempt for violating bond. Thereafter, he was indicted for possessing the cocaine. Applying the *Blockburger* test, as construed by *Whalen* and *Harris*, the Court agreed that the cocaine charge was barred by double jeopardy. In so ruling, the Court rejected the government's contention that the *Blockburger* test should not bar the prosecution, because different interests were served by the contempt charge and the subsequent drug prosecution. The Court dismissed this attempted distinction out of hand: "[T]he distinction is of no moment for purposes of the Double Jeopardy Clause, the text of which looks to whether the *offenses* are the same, not the interests that the offenses violate." *Dixon*, 113 S.Ct. at 2858 (emphasis in original).

Accordingly, after *Dixon*, it matters not for purposes of the Double Jeopardy Clause that CCE, RICO and the Travel Act were enacted to further different Congressional goals. If the *Blockburger* test controls, then Kramer's RICO and Travel Act convictions in **KRAMER II** were barred by his prior CCE conviction in **KRAMER I**.

The logical application of *Dixon* to complex crimes such as RICO, CCE and the Travel Act means that *Dixon* has effectively overruled *Garrett v. United States*, 471 U.S. 773, 779, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985), as well as the body of lower court precedent authorizing RICO prosecutions following prosecutions for the predicate acts, including the Eleventh Circuit's decision at issue in this Petition. *See* Note, *United States v. Dixon: What Does "Same Offense" Really Mean?*,

48 ARK. L. REV. 709, 749 (1995) (recognizing that *Dixon*'s use of *Blockburger* test "may have a significant impact on the future of 'complex crime' prosecutions" under RICO and CCE and speculating that "lower courts may find it much more difficult to ignore" the lesser-included offense doctrine "than in the past").[1]

Since the *Blockburger* test now controls the Double Jeopardy analysis, legislative intent to permit successive punishments for both RICO and its predicate offenses "is of no moment." *Dixon*, 113 S.Ct. at 2858. This is so, the *Dixon* Court declared, because "congressional intent, no matter how clear, cannot bestow constitutional legitimacy upon multiple punishments for the same offense when they are imposed in multiple proceedings." *United States v. 9844 South Titan Court, Unit 9, Littleton, Colorado*, 75 F.3d at 1490. *See, e.g., Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 1948, 128 L.Ed.2d 767 (1994) (finding "tax" imposed after drug conviction and forfeiture to constitute double jeopardy,

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[1] In *United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 906, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982), the court avoided the double jeopardy implications of successive CCE and RICO prosecutions by asserting that "'racketeering activity *in the abstract* does not necessarily involve a drug related activity.'" *Phillips*, 664 F.2d at 1010, n. 58 (emphasis added; citation omitted). *Dixon* teaches that viewing statutes entirely "in the abstract" is an incorrect analysis when determining whether successive prosecutions involve lesser-included offenses. Hence, it too has been overruled by *Dixon*.

regardless of congressional intent, holding that the tax "must be imposed during the first prosecution or not at all").

One aspect of the Court's decision in *Garrett* may still survive *Dixon* but is inapplicable to Kramer's situation. After approving successive prosecutions for predicate and CCE offenses on tl.e basis of legislative intent, *Garrett* held, in the alternative, that the Double Jeopardy Clause was not violated, in any event, because Garrett continued to engage in criminal conduct long *after* committing the drug offense upon which he based his Double Jeopardy claim. As the Court in *Garrett* colorfully put it: "One who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting." *Garrett*, 471 U.S. 790, 105 S.Ct. at 2417 *See also United States v. Rodriguez-Aguirre*, 73 F.3d 1023 (10th Cir. 1996) (new CCE charge not barred by double jeopardy due to defendant's prior conviction for narcotics conspiracy where new indictment "specifically refers to a number of predicate drug offenses allegedly committed by Aguirre after the [first] indictment was returned").

This aspect of *Garrett* is inapplicable to Kramer for two reasons. *First*, Kramer's two indictments occurred within a few months of each other and the Florida indictment did *not* involve criminal activity which post-dated the Illinois indictment. Unlike the situation in *Garrett*, both the "music" and the "dancing ... stopped" when Kramer was arrested and preventively detained in **KRAMER I**. *Second*, as previously discussed, under general verdict principles, the Court must assume that

Kramer's convictions in **KRAMER I** and **KRAMER II** were based upon precisely the same predicate crimes, not temporally distinct crimes.

Even if the Court could somehow construe *Dixon* to permit congressional intent to have some bearing in the Double Jeopardy analysis, it would not assist the Court in determining whether RICO charges can properly be brought following a CCE conviction. Nowhere does the legislative history of RICO suggest that RICO charges should be brought in addition to (much less subsequent to) a CCE charge, as opposed to traditional drug offenses. Indeed, the CCE statute was not even in existence at the time RICO was enacted. The CCE statute was enacted on October 27, 1970 -- twelve days *after* RICO was passed. *See United States v. Turkette*, 632 F.2d 896, 902 (1st Cir. 1980), *rev'd*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). Moreover, the original penalty for CCE was life imprisonment, while the maximum penalty for RICO has always been twenty years. Since CCE is and was the *more serious* of the two offenses, Congress would hardly have considered a RICO prosecution to be necessary following a successful CCE prosecution.

C. The Eleventh Circuit's Ruling Creates a Split In the Circuits Concerning the Application of the Double Jeopardy Clause In Complex Prosecutions

In light of *Dixon*, the Eleventh Circuit below should have utilized the *Blockburger* test, as applied to the specific charges (*see Dixon*, *Whalen* and *Harris*) at issue in **KRAMER I** and **KRAMER II**. It then should have barred Kramer's RICO and Travel Act convictions in **KRAMER II**. This Court should grant Kramer's Petition to review the Eleventh Circuit's ruling for two reasons.

First, the petition should be granted because the Eleventh Circuit's decision has decided an important question of federal law -- the proper construction of the Double Jeopardy Clause to complex crimes, such as RICO, CCE and the Travel Act -- which "conflicts with applicable decisions of this Court." *See* Supreme Court Rule 10.1(c). The Eleventh Circuit's decision conflicts with *Dixon* by woodenly applying *pre-Dixon* Double Jeopardy precedents to Kramer's case without regard to the impact of *Dixon*.

Second, the petition should be granted, pursuant to Supreme Court Rule 10.1(a), because the Eleventh Circuit's decision conflicts with other decisions of United States courts of appeal, including cases within the Eleventh Circuit itself. *See United States v. Calderone*, 982 F.2d 42 (2d Cir. 1992); *United States v. Reed*, 980 F.2d 1568 (11th Cir.), *cert. denied*, 509 U.S.

932, 113 S.Ct. 3063, 125 L.Ed.2d 745 (1993); and *United States v. Harvey*, 78 F.3d 501 (11th Cir. 1996).

In *Reed*, the defendant was first prosecuted for "lesser" offenses, drug conspiracies spanning the years 1978-1980. He was later prosecuted for engaging in the greater offense, a CCE conspiracy, spanning the years 1974-1989. Despite the longer duration of the subsequent charge, the Eleventh Circuit held that it was a violation of the Double Jeopardy Clause to prosecute Reed for the greater offense of CCE following a conviction of the lesser included offense of conspiracy. *Reed*, 980 F.2d at 1575-78. As the Eleventh Circuit explained, a conspiracy is a lesser included offense of a CCE charge because the "in concert" requirement of CCE has been interpreted to "encompass the agreement required to prove a [§ 846 or § 963] conspiracy." *Reed*, 980 F.2d at 1568, 1576 (citation omitted). The Eleventh Circuit correctly distinguished *Garrett*, recognizing that "*Garrett* did not address the issue of a CCE prosecution based on the predicate act of a drug *conspiracy*, an act similar to CCE, involving many of the same elements as CCE." *Id.* at 1575 (emphasis added).

The Eleventh Circuit reached the identical result earlier this year in *Harvey*. In 1983, Harvey was found guilty on stipulated facts of conspiracy to distribute marijuana in the Southern District of Florida. In 1990, he pled guilty in the Eastern District of Michigan to a cocaine conspiracy, part of which involved Florida. In 1991, he was indicted in the Middle District of Florida for having committed a CCE. He moved to

dismiss the new indictment on double jeopardy grounds, but his motion was denied, after an evidentiary hearing, in the district court and his interlocutory appeal was summarily rejected by the Eleventh Circuit. Following his trial and conviction, however, the Eleventh Circuit re-examined the evidence supporting the CCE charge and reversed, finding a double jeopardy violation because the CCE charge was predicated, in part, upon the Florida aspects of the 1990 Michigan case. Although the Eleventh Circuit did not discuss the impact of *Dixon* on *Garrett*, it correctly applied the *Blockburger* test without regard to any underlying legislative intent.

As in *Reed* and *Harvey*, Kramer's subsequent prosecution for the greater offenses (RICO and Travel Act) constituted a double jeopardy violation. The Eleventh Circuit's decisions at issue herein thus conflicts with both *Reed* and *Harvey*.

The Eleventh Circuit's decision also conflicts, at least implicitly, with the Second Circuit's decision in *United States v. Calderone*, 982 F.2d 42 (2d Cir. 1992). As previously discussed, CCE is considered a "conspiracy" type offense while RICO is considered a "substantive" offense. Hence, a substantive RICO charge might not always be barred by a prior CCE prosecution. *See generally United States v. Felix*, 503 U.S. 378, 112 S.Ct. 1377, 1385, 118 L.Ed.2d 25 (1992) (recognizing that there was no "ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation present in" single transaction crimes to offenses involving "multilayered conduct").

However, the distinction, if any, between the CCE "conspiracy" charge in **KRAMER I** and the RICO and Travel Act "substantive" charges in **KRAMER II** disappears due to the government's use of identical predicate offenses. As previously discussed, *Dixon* requires courts to analyze the nature of the actual charges pleaded, not the statutory offenses generally, to determine the double jeopardy consequences of a particular prosecution. Indeed, this Court in *Garrett* expressly assumed that a *substantive* importation offense and a CCE *conspiracy* charge were lesser and greater offenses. *Garrett*, 470 U.S. at 790. Since the RICO and Travel Act "substantive" charges in this case were based upon the same predicate offenses at issue in the CCE "conspiracy," they too were barred by double jeopardy.

A similar situation occurred in *United States v. Calderone*, 982 F.2d 42 (2d Cir. 1992). Calderone was originally indicted in the *Adamita* case for conspiring to import heroin from Europe into the United States and for distributing cocaine and marijuana between 1985-1988. At the conclusion of the government's case, the district court granted a Rule 29 motion for judgment of acquittal, indicating that the charges were too broad. *Calderone*, 982 F.2d at 43. The government sought to correct the problem by returning a second indictment which charged a more narrow conspiracy. *Id.* at 44. The new indictment, however, also included "substantive" offenses of using a telephone to facilitate the narcotics offenses under 21 U.S.C. § 843. *Id.* The Second Circuit ruled that *both* the new conspiracy

and substantive telephone charges were barred by Double Jeopardy. In extending its ruling to the telephone counts, the court recognized that *Felix* reiterated the "traditional rule that conspiracy and substantive offenses are different for purposes of double jeopardy." *Id.* at p. 48. Nonetheless, the court viewed the telephone counts as unique in that they alleged that the telephone was used to commit, among other things, the barred heroin conspiracy. *Id.* "Since we hold that the small conspiracy charged in Count One is the same offense, for jeopardy purposes, as the *Adamita* conspiracy, the Government cannot prosecute for a telephone substantive count by alleging use of the telephone to commit the very conspiracy prosecution of which, as a conspiracy, is barred." *Id.*

Under *Calderone*, the government in this case was barred from prosecuting Kramer for RICO and the Travel Act ("substantive" charges), as well as RICO conspiracy, if the RICO and Travel Act charges were based entirely upon the commission of other charges which the government could not still independently prosecute due to a Double Jeopardy bar. The government in this case plainly *was* barred from prosecuting Kramer separately for the predicate drug importations used to support the CCE charge in **KRAMER I** after convicting him of the CCE charge. Yet, these same predicates were utilized in **KRAMER II** to support the RICO and Travel Act charges. Hence, under *Calderone*, the RICO and Travel Act charges were barred by Double Jeopardy.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully requests that his Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed this 15th day of October 1996 to: The Solicitor General, United States Department of Justice, 10th & Constitution Avenues, N.W., Washington, D.C. 20530; United States Department of Justice, Criminal Division, Appellate Section, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044-0899; and Robert J. Bondi, Assistant United States Attorney, United States Attorney's Office, 99 N.E. 4th Street, Miami, FL 33128.

G. RICHARD STRAFER

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 90-5055, 90-5360, 90-5431, 90-5751, 91-5659 and 93-4951

January 16, 1996

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

BENJAMIN BARRY KRAMER,

Defendant-Appellant.

Following two jury trials before the United States District court for the Southern District of Florida, No. 87-879-CR-NCR, Norman C. Roettger, Jr., Chief Judge, and No. 91-897-CR-FAM, Federico A. Moreno, J., defendant was convicted of violations of Racketeer Influenced and Corrupt Organizations Act (RICO) and Travel Act, money laundering, obstruction of justice, and perjury, and judgment of forfeiture was entered in connection with RICO charge. Defendant appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) evidence was sufficient to sustain Travel Act convictions; (2) Allen charge was not too coercive; (3) evidence was insufficient to sustain defendant's conviction of money laundering; (4) collateral estoppel did not bar perjury and

obstruction of justice prosecution based on defendant's testimony in earlier trial; (5) retroactive application of Gaudin rule requiring submission of issue of materiality to jury in perjury prosecution to case on direct review under plain error standard did not require reversal; and (6) forfeiture of defendant's interest in casino was improper.

Affirmed in part, reversed in part.

Barkett, Circuit Judge, specially concurred with opinion.

1. **Criminal Law - 1139**

Claim of insufficient evidence to sustain conviction is reviewed de novo.

2. **Commerce - 82.6**

Conviction under Travel Act required jury to find that defendant traveled in interstate commerce with intent to promote unlawful activity and thereafter actually did promote or attempt to promote unlawful activity. 18 U.S.C.A. § 1952(a)(3).

3. **Commerce - 82.6**

Evidence was sufficient to sustain construction company president's conviction under Travel for traveling in interstate commerce with intent to promote money laundering operation involving drug proceeds that were used to finance construction

project, notwithstanding his testimony that he was unknowing dup. 18 U.S.C.A. § 1952(a)(3).

4. **Criminal Law - 878(4)**

Inconsistent verdicts do not open conviction on particular count to attack.

5. **Criminal Law - 865(1.5)**

Allen charge given after seven days of jury deliberation was not too coercive; charge encouraged jurors to reach unanimous verdict, but also instructed jurors not to give up honestly held beliefs and to return not guilty verdict if evidence did not show guilt beyond reasonable doubt.

6. **Criminal Law - 1153(1)**

District court's decision to allow rebuttal testimony is reviewed for abuse of discretion.

7. **Criminal Law - 683(1)**

Allowing government in Travel Act and money laundering prosecution to recall bookkeeper to testify about newly subpoenaed documents was not abuse of discretion where defendant was allowed to see documents before bookkeeper

testified and was given opportunity to cross-examine bookkeeper.

8. **United States - 34**

Each transaction or transfer of money criminalized by money laundering statute constitutes separate offense; statute does not make money laundering continuing offense. 18 U.S.C.A. § 1956(a)(2)(B)(i).

9. **United States - 34**

Defendant could not be convicted of money laundering based upon his conduct in transferring funds from one location outside United States to another since transaction was totally outside of country and was separate from one originating in United States. 18 U.S.C. § 1956(a)(2).

10. **United States - 34**

Defendant could not be found guilty of money laundering for participating in transfer of funds from one foreign country to another on theory that his actions aided and abetted transfer of funds from United States which was covered by money laundering statute where jury was instructed on aiding and abetting theory and would have indicated by its special verdict that defendant "committed" transfer of funds from

United States had they found him either principal or aided in such transfer. 18 U.S.C.A. § 1956(a)(2).

11. **Double Jeopardy - 3**

Collateral estoppel bars later prosecution under double jeopardy only where fact or issue necessarily determined in defendant's favor in former trial is essential element of conviction at second trial. U.S.C.A. Const.Amend.5.

12. **Judgment - 751**

Collateral estoppel did not bar defendant's prosecution on perjury and obstruction of justice charges arising out of his testimony at earlier prosecution where, despite defendant's acquittal on one charge at earlier trial, record indicated that jury actually rejected parts of defendant's testimony, rather than accepting his testimony, which subsequently formed basis for perjury and obstructive charges. U.S.C.A. Const.Amend.5; 18 U.S.C.A. §§ 1503, 1623.

13. **Criminal Law - 1030(1)**

Court of Appeals reviews assertion of error which were not objected to at trial for plain error. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.

14. **Criminal Law - 1308.2**

Assertion of *Gaudin* error, which involves failure to submit materiality issue to jury in perjury prosecution, would be reviewed for plain error, even though case was tried before *Gaudin* was decided. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.

15. **Criminal Law - 1038.2**

Reversal for unobjected-to error based on retroactively applied *Gaudin* decision, which requires jury to decide materiality in perjury prosecution, was possible, but not required, where error was both (1) plain and (2) affected substantial rights. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.

16. **Criminal Law - 1030(1)**

For purposes of plain error review, error is "plain" where "plainness" of error becomes apparent on direct review; error need not be plain at time of trial. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.

17. **Criminal Law - 1141(2)**

When defendant seeks reversal for unobjected-to error, defendant has burden of showing that plain error affected his substantial rights. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.

18. **Criminal Law - 1173.2(2)**

Plain error occurring in perjury prosecution when question of materiality was not submitted to jury did not require reversal of conviction where defendant failed to show that failure to submit issue of materiality to jury affected outcome of trial. Fed.Rules Cr.Proc. Rule 52(b), 18 U.S.C.A; 18 U.S.C.A. §§ 1503, 1623.

19. **Forfeitures - 3**

Defendant's interest in casino was not forfeitable in Racketeer Influenced and Corrupt Organizations Act (RICO) proceeding is limited to that which defendant obtains directly or indirectly as result of racketeering activity. 18 U.S.C.A. § 1963(a)(3).

20. **Forfeitures - 3**

Defendant's interest in casino was not forfeitable in Racketeer Influenced and Corrupt Organizations Act (RICO) proceeding where only acts of racketeering which were both charged by government and found by jury to have been committed by defendant occurred after he had obtained his interest in casino; as such, property could not be deemed to have been derived from his acts of racketeering. 18 U.S.C.A. § 1963(a)(3).

Kenneth J. Kukec, Miami, FL, for Benjamin Kramer in Nos. 90-5055, 90-5360 and 90-5751.

Bruce Rogow, Ft. Lauderdale, FL, for Michael Gilbert in Nos. 90-5055, 90-5431,, 91-5659 & 93-4951.

Dexter W. Lehtinen, U.S. Atty., Robert J. Bondi, Alice Ann Burns, Linda Collins Hertz, Anne M. Hayes, Asst. U.S. Attys., Miami, FL, for U.S. in Nos. 90-5055, 90-5431, 90-5751, 90-5360 & 91-5659.

Michael S. Pasano, Miami, FL, for Michael Gilbert.

Steven E.M. Hartz, Miami, FL for M. Dale Lyon & Lyon Children Trust in No. 90-5431.

Robert L. Shevin, Miami, FL, Stephen D. Miller, Los Angeles, CA, for David C. Pierson & Lois J. Pierson.

Richard H. Kirschner, Los Angeles, CA, A. Scott Miller, Miami, FL, for Julieann Coyne Wasson & Christopher Wasson.

William W. Taylor, Jr., Zuckerman, Spaeder, Goldstein, Taylor & Kulker, Washington, D.C., for Michael Gilbert, el al. in No. 90-5431.

Edward R. Shohat, Bierman, Shohat & Loewy, Miami, FL, for M. Dale Lyon and Lyon Children Trust in Nos. 90-5431 & 91-5659.

Marshall B. Grossman, Jonathan A. Loeb, Paul H. Rochmes, Alschuler, Grossman & Pines, Los Angeles, CA, for Karen Gilbert in Nos. 90-5431 & 91-5659.

Deborah J. Cantrell, Ross, Sacks & Glazier, Los Angeles, CA, for Michael S. Gilbert Family Irrevocable Trust in No. 90-5431.

Michael S. Pasano, Frederick W. Sall, Zuckerman, Spaeder, Taylor & Evans, Miami, FL, Deborah J. Cantrell, Ross, Sacks & Glazier, Los Angeles, CA, for Michael Gilbert Family Irrevocable Trust in No. 91-5659.

Michael S. Pasano, Humberto J. Pena, Zuckerman, Spaeder, Goldstein, Taylor & Kulker, Miami, FL, Bruce Rogow, Bruce S. Rogow, P.A., Beverly A. Pohl, Ft. Lauderdale, FL, for Michael Gilbert in No. 93-4951.

Kendall Coffey, U.S. Atty., Linda Collins Hertz, Alice Ann Burns, Anne M. Hayes, Robert J. Bondi, Asst. U.S. Attys., Miami, FL, for U.S. in No. 93-4951.

Appeals from the United States District Court for the Southern District of Florida.

Before EDMONDSON and BARKETT, Circuit Judges, and DYER, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

Benjamin Kramer and Michael Gilbert appeal their convictions for RICO and Travel Act Violations.[1] Gilbert also appeals convictions for money laundering and obstruction of justice and perjury - and a judgment of forfeiture. We reverse Gilbert's conviction for money laundering and the forfeiture judgment. In all other respects we affirm.

Between the years 1982 and 1987 Benjamin Kramer imported huge quantities of marijuana into the United States.[2] Sam Gilbert, a wealthy businessman in Los Angeles, was one of many who assisted Kramer in laundering the considerable amounts of cash generated by this operation. When Kramer would have cash delivered to California, Sam Gilbert would convert it to cashier's checks. Michael Gilbert (Sam Gilbert's son and business associate) obtained many of these cashier's

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[1] We have weighed the merits of Benjamin Kramer's Sixth Amendment claim and Fifth Amendment Double Jeopardy claim, and we affirm Kramer's convictions.

[2] The Kramer organization imported an estimated 500,000 pounds of marijuana into the United States, resulting in a profit to Kramer of $60 million.

checks from a local bank.[3] Cashier's checks were also obtained through the fictitious sale of precious metal coins. Michael Gilbert delivered cash in sealed boxes to the banker responsible for this "cash to coins" portion of the laundering scheme. These cashier's checks were then sent to a shall company in Liechtenstein. From there the money was transferred through other entities in other countries to further disguise the origin of the money.

Sam Gilbert formed a California entity ("CGL") to receive the money after it was "cleaned" by these transfers. CGL, purporting to be a legitimate mortgage broker, loaned $15 million to finance a casino, the Bells Gardens Bicycle Club ("BGBC"). Sam Gilbert's construction company, Sam Gilbert Associates ("SGA"), supervised this construction. CGL also helped finance the Fort Apache Marine in Miami. Michael Gilbert, also an officer at CGL, supervised the construction of the Marina.[4]

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[3] Michael Gilbert also signed checks paying Kramer a fictitious salary for "consulting" work and deposited cash into a special company account allegedly established to distribute drug proceeds.

[4] The end result of these transfers and construction projects was that tracing the drug proceeds directly was prevented by the deposit of the cashiers' checks in foreign banks. And, tracing from the construction projects to their source of financing would reveal only that CGL had received a "loan" from a foreign entity protected by bank secrecy laws.

Kramer decided to convert his assets to cash and demanded that the BGBC pay its mortgage. BGBC obtained a loan and paid CGL with a $9.5 million cashier's check. The $9.5 million was sent from California to Switzerland, where it remained until it was transferred to Luxembourg. Michael Gilbert signed a CGL board resolution authorizing the transfer of these funds from Switzerland to Luxembourg. Michael Gilbert maintained that he did not realize that his acts were furthering a criminal enterprise and that he was simply following the directions of his father, Sam. Sam Gilbert died before Michael's trial.

In a 1990 trial following his arrest, Michael Gilbert was convicted of three counts to violating the Travel Act, 18 U.S.C. § 1952, and one count of violation the RICO statute, 18 U.S.C. § 1962(d). He was acquitted on a RICO conspiracy count and acquitted on various other Travel Act counts. Later, the same jury also returned a forfeiture verdict against Gilbert's interest in the BGBC.

In 1993, in a separate proceeding, Michael Gilbert was tried and convicted of money laundering under 18 U.S.C. § 1956(a)(2)(B)(i), and of obstruction of justice and perjury based on his testimony in the 1990 trial.

I. Sufficiency of the Evidence

[1] Michael Gilbert argues that the evidence was insufficient to sustain his convictions on the Travel Act counts. A claim of insufficient evidence to sustain a conviction is reviewed *de novo*. *United States v. Mieres-Borges*, 919 F.2d 652, 656 (11th Cir. 1990).

[2] A conviction under the Travel Act required the jury to find that the defendant traveled in interstate commerce with the intent to promote unlawful activity and thereafter actually did promote or attempt to promote the unlawful activity. *See* 18 U.S.C. § 1952(a)(3). Gilbert's convictions were based on three trips between California and Miami in 1985 which were alleged to have been in furtherance of the money laundering scheme.

[3] Gilbert first argues that no reasonable juror could find that it was he who traveled between California and Miami on the dates in question. The government presented the jury with receipts from travel agencies, credit cards, and airlines - all bearing Michael Gilbert's name and all placing him in Miami on the dates in question. Gilbert, who lived in California, testified that he traveled to Miami to supervise the construction of the Fort Apache Marina. Gilbert also testified that the Marina was under construction on the dates he was alleged to have traveled to Miami. As such, it was reasonable for the jury to conclude that it was Gilbert who traveled to Miami.

For the jury to conclude that gilbert's travels in fact promoted the illegal scheme was also reasonable. The jury properly concluded that Gilbert's travels were to supervise the construction of the Marina. And, the Marina project was financed with Kramer drug money funnelled through CGL.[5] Thus, the jury properly concluded Gilbert's travel to construct the marina in fact assisted the money laundering operation.

Gilbert also argues the government did not prove that he traveled with the intent to promote the illegal scheme. At the outset, we point out that intent and knowledge are nearly always proved by circumstantial evidence. Because the Travel Act convictions must be based on proof of guilty knowledge during specific travels, we will briefly explain why the jury was entitled to conclude that Gilbert knew his travels furthered the unlawful enterprise.

[4] First, Special Agent Roger Edwards explained to the jury how CGL was established for the unlawful purpose of laundering drug money. Second, the jury was entitled to infer

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[5] IRS Special Agent Roger Edwards explained to the jury how Kramer drug money would eventually return to the United States in the form of a "loan" to CGL. As for CGL's financial stake in the marina project, Edwards told the jury that CGL "funded the initial construction costs of Fort Apache Marina in Miami;" and Gilbert said that he knew CGL financed the project.

that Gilbert knew the illegal source of CGL's money.[6] Third, Gilbert told the jury that he knew CGL helped finance the Marina. Fourth, the jury was entitled to believe that Gilbert traveled to Miami on the dates alleged to supervise the construction of the Marina. Thus, that the jury was entitled to conclude that Gilbert knew that his trips to Miami were to help disguise Kramer drug proceeds through the construction of the Marina is clear. This amount of evidence is sufficient to sustain Gilbert's convictions.[7]

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[6] First, extensive proof exists of Gilbert's involvement in the overall money laundering scheme. For example, he delivered boxes of cash; his signature appears on wire transfers; he admits authorizing the transfer of drug money through Europe; and he obtained cashers' checks from local banks. Even he admits in his briefs that he "assisted his father and the Kramers in acts of money laundering." From this extensive involvement, the jury was entitled to believe that Gilbert knew CGL's role in the enterprise.

Second, extensive proof was presented of Gilbert's management role in CGL. For example, Gilbert was vice president of CGL; he attended CGL board meetings; he signed CGL board resolutions; and his travel expenses were billed to CGL. Thus, the jury was entitled, at a minimum to infer that Gilbert knew the source of CGL's money.

[7] Gilbert attempts to support his evidentiary and *Allen* charge, *infra*, claims by noting that nearly identical evidence was offered on all ten Travel Act counts and that the jury convicted him on only three. But, inconsistent verdicts do not open a conviction on a particular count to attack. As Justice Holmes

(continued...)

In addition, I note that Gilbert took the stand and offered an explanation for all his misdeeds - he told the jury he was the unknowing dupe of his father. The jury could have chosen to believe Gilbert and entered a verdict of acquittal. But, the jury was also entitled to disbelieve Gilbert's testimony and to consider it substantive evidence of guilt, especially on the question of his intent. *See United States v. Brown,* 53 F.3d 312, 314-15 (11th Cir. 1995).

II. *Allen* Charge

[5] After seven days of deliberation, the jury notified the court that it was unable to reach a unanimous verdict on Michael Gilbert. In response, the court issued a modified pattern *Allen* charge.[8] The charge encouraged jurors to reach a unanimous verdict, but also instructed jurors not to give up honestly held beliefs and to return a not guilty verdict if the evidence did not show guilt beyond a reasonable doubt. The

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[7](...continued)
wrote in *Dunn v. U.S.*, 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356 (1932), "[t]he most that can be said in such cases is that the verdict shows that either in the acquittal or in the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *See also, U.S. v. Powell,* 469 U.S. 57, 69, 105 S.Ct. 471, 479, 83 L.Ed. 2d 461 (1984) (reaffirming *Dunn*).

[8] *See Allen v. United States,* 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

next day the jury returned its guilty verdict. In reviewing the propriety of an *Allen* charge, we consider its coercive impact. *U.S. v. Elkins,* 885 F.2d 775, 783 (11th Cir. 1989).

[6,7] While we recognize concerns that an *Allen* charge might unduly coerce a juror into agreement in a close case, *see U.S. v. Rey,* 811 F.2d 1453, 1460 (11th Cir. 1987), the charge given in this case does not differ materially from the instructions which we have approved in the past. Therefore, we do not see this charge to be too coercive.[9]

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[9] Gilbert also argues that the district court abused its discretion in allowing the government to recall Teresa Hurd, the bookkeeper and vice-president of SGA, and in allowing Hurd to testify about newly subpoenaed documents. The district court's decision to allow rebuttal testimony is reviewed for abuse of discretion. *U.S. v. Hawkins,* 905 F.2d 1489, 1496 (11th Cir. 1990).

Gilbert claims prejudice because the testimony was allowed and because he was not immediately allowed to see the documents. But, the government responds that prejudice only if the defendant is not allowed any opportunity to controvert newly introduced evidence. *U.S. v. Bulman,* 667 F.2d 1374, 1382 n. 12 (11th Cir. 1982). Here, Gilbert was allowed to see the documents before Hurd testified; and Gilbert was given the opportunity to cross-examine Hurd. Under the circumstances, there was no abuse of discretion.

III. Money Laundering Statute

Michael Gilbert was also convicted of violating 18 U.S.C. § 1956(a)(2), which prohibits the transporting of funds form a place in the United States to or through a place outside the United States intending to conceal the source of the funds and knowing that the funds are the proceeds of unlawful activity.

The jury, as shown on the special verdict form used,[10] that Gilbert intended to further the laundering scheme by causing the transfer of $9.5 million from Switzerland to Luxembourg. The jury, however, also found that Gilbert did not cause the transfer of the same money from the United States to Switzerland. Gilbert argues that these findings do not support a conviction under the money laundering statute because the statute does not criminalize transfers which are not to or from the United States. *See* 18 U.S.C. § 1956(a)(2)(B)(i).

The United States makes two arguments which attempt to reconcile the jury's special verdict with the statutory requirements. First, it argues that the statute is satisfied because Gilbert's acts in Europe were part of a continuing transaction which originated in the United States.

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[10] Because the verdict form is so central to our discussion of the section 1956 prosecution, the verdict form and the corresponding count of the indictment have been attached to this opinion as an appendix.

[8] But, the statute does not make money laundering a continuing offense. The statutory language and legislative history indicate that each transaction or transfer of money constitutes a separate offense. *See* S.Rep.. No. 433, 99th Cong.2d Sess. 12-13 (1986); *U.S. v. Conley*, 826 F. Supp. 1536, 1543-44 (W.D.Pa.1993) (concluding that unit of prosecution is "each individual financial transaction").

[9] The jury found that Gilbert was involved in only one transaction, and the transaction was totally outside of this country. Because this transaction is separate from the one originating in the United States and because money laundering is not a continuing offense, Gilbert's conviction cannot be upheld on this basis.[11]

[10] In the alternative, the government argues that Gilbert aided and abetted the transfer of funds form the United States by his participation in the European transaction. This

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[11] Gilbert was convicted under 18 U.S.C. § 1956(a)(2). We recognize that *Conley, supra,* and Senate Report No. 433, *supra,* discuss different sections of the money laundering statute. We also know that section (a)(2), unlike other portions of the statute, does not explicitly refer to "a financial transaction" as the crime. These points do not change our result. The statutory language, taken as a whole, manifests the intent by Congress to make each transaction or transfer a separate crime. *Cf. U.S. v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971) (requiring all ambiguity in criminal statute to be construed in favor of accused).

argument also must fail in the light of the jury's special verdict. The jury was instructed that a defendant who aids and abets another person is responsible for the conduct of that other person just as though the defendant engaged in the conduct himself. Thus, the jury would have indicated that Gilbert "committed" the transfer of funds from the United States had they found him to be either a principal or an aider in this transfer.

By its verdict, the jury found that Gilbert had not caused the transfer of funds from the United States to Switzerland either directly or as an aider and abetter. As such, the jury's special verdict does not support a conviction under Section 1956. The conviction for money laundering must be reversed.

IV. Obstruction of Justice and Perjury Convictions

In his testimony in 1990, Gilbert, as part of his theory of defense that he lacked criminal intent - denied knowing that boxes he delivered contained cash and denied authorizing a wire transfer of $15,000 to Miami. Based on these denials, Gilbert was convicted of perjury and obstruction of justice in the 1993 trial. *See*, 18 U.S.C. §§ 1623; 1503. Gilbert challenges these convictions on two grounds. First, he says the convictions are barred by collateral estoppel. Second, he argues that the convictions must be reversed in the light of *U.S. v. Gaudin*, ___ U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

A. Collateral Estoppel

Gilbert argues that his 1993 convictions are barred by the doctrine of collateral estoppel.[12] He says that to permit these charges would allow the government to rehash in 1993 an argument that failed to persuade the jury in 1990. *See, e.g., U.S. v. Sarno*, 596 F.2d 404, 408 (9th Cir.1979) (using collateral estoppel to bar perjury prosecution where acquittal in prior proceeding was based on jury accepting defendant's testimony as true).

[11] The doctrine of collateral estoppel is included within the constitutional prohibition of double jeopardy. *She v. Swenson*, 397 U.S. 436, 445-46, 90 S.Ct. 1189, 195-96, 25 L.Ed.2d 469 (1970). But, Collateral estoppel bars a later prosecution "only where a fact or issue necessarily determined in the defendant's favor in the former trial is an essential element of conviction at the second trial." *U.S. v. Brown*, 983 F.2d 201, 202 (11th Cir. 1993).

[12] Therefore, Gilbert must persuade us that the jury's 1990 acquittal on the conspiracy charge was based on a finding that he lacked the criminal intent to further the money laundering enterprise. This Gilbert cannot do. Because Gilbert was convicted on several of the Travel Act counts, the jury

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[12] He does not challenge the sufficiency of the evidence supporting these convictions.

necessarily concluded that he had the intent to promote the unlawful scheme. Thus, instead of relying on Gilbert's testimony, the jury actually rejected parts of it.[13]

Also, a collateral estoppel claim must fail where "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe v. Swenson*, 397 U.S. at 444, 90 S.Ct. at 1194. In this case, a rational jury could have based its conspiracy acquittal on a finding that Gilbert failed to agree to join the conspiracy.[14] Because Gilbert has been unable to carry his burden of persuasion, we conclude that the perjury

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[13] In addition, Gilbert testified for three days in 1990. The perjury charges spring from his responses to only two lines of questioning. Gilbert, who bears the burden of persuasion on the collateral estoppel issue. *U.S. v. Hewitt,* 663 F.2d 1381, 1387 (11th Cir. 1981), is hard pressed to prove which, if any, parts of his lengthy testimony the jury relied upon in its 1990 verdict.

[14] In applying the doctrine of collateral estoppel, the Supreme Court, *Ashe v. Swenson*, 397 U.S. at 444, 90 S.Ct. at 1194, mandates us to "examine the record of a prior proceeding." A review of this record reveals that Gilbert discussed in closing (and that the jury was so instructed) that a conspiracy conviction would require a finding of an agreement. A finding of no agreement would reconcile the seemingly inconsistent RICO and RICO conspiracy verdicts. *See U.S. v. Brown,* 983 F.2d at 203 (noting that reviewing court must make "a practical and realistic assessment of what makes the jury verdict coherent").

and obstruction of justice convictions are not barred by collateral estoppel.

B. *Gaudin* Error

In the 1993 trial, the jury did not decide whether Gilbert's false statements were material because it was then well established that materiality was a question of law. *See, e.g., U.S. v. Dennis*, 786 F.2d 1029, 1041 (11th Cir.1986). Thus, the trial court made the finding of materiality and so instructed the jury. We now know, however, that the constitution requires that the jury determine whether an allegedly false statement is "material" in a section 1623 prosecution. *See U.S. v. Gaudin*, ___U.S.___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *Porat v. U.S.*, ___U.S.___, 115 S.Ct. 2604, 132 L.Ed.2d 849 (1995). The rule announced in *Gaudin* applies retroactively to this directly appeal. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987).

[13] We review assertion of error which were not objected to at trial for plain error. *See* Fed. Rule Crim.P. 52(b); *U.S. v. Olano*, 507 U.S. 725, 732-34, 113 St.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993). Gilbert, who did not object to the materiality instruction, asserts that plain error review is inappropriate and too unfavorable to him because no error occurred at trial which he could object, except that shown by a later Supreme Court decision. Gilbert urges us to adopt a *per*

se reversal rule for *Gaudin* violations. *Cf. U.S. v. Pearson*, 897 f.Supp[. 1147, 1148 (C.D. Ill. 1995).

[14] Instead, we follow the lead of the other circuits confronting this situation and conclude that Rule 52(b) plain error review is all that we are authorized to undertake.[15] *See U.S. v. Keys*, 67 F.3d 801, 809 (9th Cir.1995); *U.S. v. Rogers*, 18 F.3d 265, 268 (4th cir.1994); *U.S. v. Retos*, 25 F.3d 1220, 1230 (3d Cir.1994); *U.S. v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994); *U.S. v. Jones*, 21 F.3d 165, 172-73 (7th Cir. 1994); *but see U.S. v. Washington*, 12 F.3d 1128, 1138 (D.C.Cir.1994) (suggesting non-Rule 52(b) based "supervening-decision doctrine" applies).

[15, 16] Under these circumstances, reversal for unobjected-to error is possible (but not required) where error is both (1) plain and (2) affects substantial rights. *Olano*, 507 U.S. at 732-36, 113 S.Ct. at 1777-78. As we now know, the failure to submit the question of materiality to the jury is plain error.[16] But, Gilbert cannot show that the failure to submit

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[15] This result is appropriate because Rule 52(b) is triggered where (as in this case) review is asked of error not brought to the attention of the trial court.

[16] Some dispute surrounds whether error must be "plain" at the time of trial or "plain" when the case is being reviewed. *Compare Washington*, 12 F.3d at 1138 (error must be plain at time of trial), *with Retos*, 25 F.3d at 1230 (intervening decision can make error "plain"); *Jones*, 21 F.3d at 173 (same); *and* (continued...)

the issue of materiality to the jury affected his substantial rights (that is, affected the outcome of his trial).[17]

[17, 18] From the record before us, it is clear that Gilbert's denials of criminal knowledge (which the 1993 jury found - in a conclusion not challenged on appeal - to be lied) were capable of influencing the 1990 jury. *See Dennis*, 786 F.2d at 1041 n. 15 (defining "materiality"). Gilbert does not assert that the failure to submit the materiality issue to the jury affected the outcome of his case. (He instead argues for a *per se* rule of reversal.) He does not assert he was truly harmed,

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[16](...continued)
Viola, 35 F.3d at 42 (same). We conclude that error is "plain" under *Olano* where the "plainness" of error becomes apparent on direct review.

[17] Some courts have suggested - relying on the Supreme Court's explanation in *Olano* that it was not confronting this kind of case - that a defendant has no burden to show his trial could have come out differently without the *Gaudin* error. *See Keys*, 67 F.3d at 810 (assuming without deciding defendant need not establish prejudice, but affirming conviction nonetheless); *cf. Viola*, 35 F.3d at 42 (adjusting *Olano* burden of persuasion). We decline to excuse Gilbert's burden of compliance with Rule 52(b) as interpreted in *Olano* and, thus, hold that he must persuade us that the error affected his substantial rights. *See generally U.S. v. Gaudin* 28 F.3d 943, 962-64 (9th Cir.1994) (Kozinski, J., dissenting) (explaining why it is inappropriate to create "nebulous exception" to *Olano*). We also note that the *Olano* Court held that the burden-shifting to the defendant was "dictated" by the text of Rule 52(b). *Olano*, 507 U.S. at 734-36, 113 S.Ct. at 1778.

we presume, because a review of the record shows conclusively that the district court properly determined - and we are unconvinced that a reasonable juror could have found otherwise - that Gilbert's lies had the capability of influencing the 1990 jury.[18] Because Gilbert has failed to show that the failure to submit the issue of materiality to the jury affected the outcome of his trial, we affirm the perjury and obstruction of justice convictions.[19]

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[18] Because the district court actually made a finding (and the government produced conclusive evidence to show) that Gilbert's disputed testimony was material, this case is different than cases in other circuits finding the prejudice element of *Olano* satisfied. *See Viola*, 35 F.3d at 43 (prejudice where *no* finding (by either judge or jury) on sufficiency of evidence for necessary element of crime); *Jones*, 21 F.3d at 172-73 (prejudice where government presented no evidence to establish necessary element of offense); *Retos*, 25 F.3d at 1232 (prejudice where evidence on essential element not conclusive).

[19] Gilbert also argues his count 20 conviction under 18 U.S.C. 1503 for obstruction of justice should be reversed under *Gaudin*. He says the instruction on Count 25 (that the statements were material for section 1623 purposes) infected the conviction under Section 1503. Because we presume that the jury followed its instruction to determine for itself whether the government proved beyond reasonable doubt that Gilbert's testimony would be likely to have the natural and probable consequence of obstruction the 1990 trial, we reject this argument without relying on our affirmance of the count 25 perjury conviction.

In addition, we stress that we see, given the evidence, no miscarriage of justice here.[20] Given the way in which the matter of materiality was handled in this case, we question that the fairness, integrity or public reputation of judicial proceedings were actually seriously affected. Thus, even if we had not placed the burden to satisfy the *Olano* prejudice requirement on Gilbert, we - on alternative grounds - would probably still decline to reverse Gilbert's convictions. *See Keys*, 67 F.3d at 810-812 (explaining why, under similar facts, court refused to reverse conviction).

V. Bell Gardens Club Forfeiture

Gilbert argues that the forfeiture of his interest in the BGBC cannot stand because the jury found that the first racketeering activity he engaged in occurred after he had already acquired his interest in the BGBC. Thus, he says, his interest could not have been derived from his racketeering activity. The government responds that the jury by its RICO conviction, found that Gilbert had been a member of the racketeering enterprise and that the BGBC forfeiture for

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[20] Even where a defendant satisfied all three *Olano* prerequisites, an appellate court has only limited discretion to correct error. *Olano*, 507 U.S. at 736-37, 113 S.Ct. at 1779. Reversal under *Olano* may only be done, even where a defendant has carried the burden of showing prejudice, (1) where not to reverse would result in the conviction of a defendant actually innocent or (2) to protect the fairness, integrity or public reputation of judicial proceedings. *Id.*

Gilbert was correct because BGBC was built using Kramer drug money.[21]

The jury convicted Gilbert on three of ten Travel Act counts. That the Travel Act convictions related solely to activity which occurred after Gilbert acquired his interest in the BGBC is undisputed. The jury was instructed that to forfeit Gilbert's interest in the BGBC it must find beyond reasonable doubt that this interest was "obtained . . . from the racketeering activity as charged in [the RICO count of the indictment]."

[19, 20] The RICO count listed ten racketeering acts alleged to have been committed by Michael Gilbert. Under the instructions, the jury was not allowed to forfeit Gilbert's interest by finding that he committed racketeering acts which were not also listed in the RICO count. Each racketeering act listed in the RICO count was also separately charged as a Travel Act offense. And, the jury was instructed that their previous determinations of guilt were conclusive and that "you must not seek to discuss or determine anew the guilt

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[21] We note that Gilbert was specifically acquitted of a RICO conspiracy charge, which means that the forfeiture must stand or fall solely on Gilbert's violation of the substantive. RICO statute. *Cf. U.S. v. Persico*, 832 F.2d 705, 713-14 (2d Cir.1987) (distinguishing substantive RICO from RICO conspiracy for statute of limitation purposes).

or innocence of . . . Defendants."[22] Therefore, in earlier deciding Gilbert's guild on the Travel Act counts, the jury also decided which acts of racketeering Gilbert had committed. Our consideration of these factors leads us to conclude that the forfeiture of Michael Gilbert's interest in the BGBC was improper. Property forfeitable in a rico proceeding is limited to that which the defendant obtains directly or indirectly as a result of the racketeering activity. *See* 18 U.S.C. § 1963(a)(3). The only acts of racketeering which were both charged by the government and found by the jury to have been committed by Gilbert occurred after he had obtained his interest in the BGBC. Property acquired before a defendant commits an act of racketeering cannot be said to have been derived from it. As such, the forfeiture of Michael Gilbert's interest in the BGBC must be set aside.[23]

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[22] Given the instructions, the jury could not properly and effectively find that while the government failed to prove the Travel Act offenses pre-dating Gilbert's BGBC interest beyond reasonable doubt, it did prove them by a preponderance of the evidence. *Cf., for example, U.S. v. Elgersma*, 971 F.2d 690, 695 (11th Cir. 1992) (en banc) (upholding forfeiture under Section 853(a) under preponderance of evidence standard.

[23] Because we hold that Michael Gilbert's interest in the BGBC is not subject to forfeiture, neither are the interests of Karen Gilbert and MGIFT. And, order restraining Michael Gilbert, Karen Gilbert or the MGIFT from the use and enjoyment of their interest in the BGBC, including profits, are to be, for them set aside also.

(continued...)

APPENDIX

COUNT 19

Between in or about January, 1987 and on or about November 20, 1987, in the Southern District of Florida and elsewhere, the defendants,

M. DALE LYON,
STEPHEN B. FAINSBERT,
MICHAEL S. GILBERT,
JOHN DOE, a/k/a "ANGEL",

co-conspirators, Jack Kramer, Benjamin Barry Kramer, Melvyn Kessler, and others known and unknown to the Grand Jury, M. DALE LYON, MICHAEL S. GILBERT and/or STEPHEN B.

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[23](...continued)

Because the government, as we understand it, still does have some interest in the BGBC due to other forfeitures, we anticipate the district court will, in the light of the differing ownership interests, need to hold a hearing or hearings and to issue additional orders about the BGBC's future operations upon the district court's receiving of the mandate from this court.

Finally, because of settlement, the forfeiture appeal of third party claimants. (No. 90-5431) is dismissed as moot.

FAINSBERT being citizens of the United States, did knowingly and willfully transport, and attempt to transport monetary instruments and funds from a place in the United States to and through a place outside the United States by performing the following activities, among others:

1. Causing the transportation of Bank of Beverly Hills cashier's check #85810 in the amount of $9,500,000 from California to Switzerland on or about February 17, 1987; and
2. Causing the transportation of $9,500,000 from Switzerland to Luxembourg on or about October 14, 1987; and
3. Causing the transportation of $8,500,000 from Luxembourg to Liechtenstein on or about November 16, 1987; and
4. Causing the transportation of approximately $4,000,000 in cash from Liechtenstein to Switzerland on or about November 16, 1987;

knowing that the monetary instruments and funds involved in the transportation represented the proceeds of some form of unlawful activity and knowing that the transportation was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of the specified unlawful activity.

In violation of Title 18, United States Code, Sections 1956(a)(2)(B)(I) and 2.

BARKETT, Circuit Judge, specially concurring:

I concur fully in the majority opinion except as to Parts I and IVB, in which I concur specially. I join the majority's conclusion in Part I that Gilbert's Travel Act convictions should be affirmed because I believe the government introduced sufficient evidence to support the convictions.

Regarding Part IVB, I likewise agree with the majority's conclusion that Gilbert's perjury conviction should be affirmed. However, I disagree that it is a defendant's burden to demonstrate prejudice from unobjected-to plain error where the error becomes plain as a result of a supervening decision. I think the Second Circuit correctly determined that "when a supervening decision alters settled law, . . . the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is borne by the government, and not the defendant." *United States v. Viola*, 35 F.3d 37, 42 (2d Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995); *see also United States v. Keys*, 67 F.3d 801, 810 (9th Cir.1995).

The reason for placing the burden on the government is explained by the Second Circuit in *Viola*:

> In the ordinary case, an even, such as the issuance of a jury instruction, occurs which is clear error under the law at the time of trial. Because the law is clear, the defendant is on notice of the duty to object. If he fails to object,

> he not only forfeits his legal right to have the error corrected, but he impedes the judicial process by failing to prompt the trial judge to make timely correction of the error. It is proper to hold a defendant accountable for that failure, and to deter defendants from strategically withholding an objection in order to seek reversal on appeal. The defendant rightly bears the burden of proving prejudice in the ordinary case.
>
> The situation is different when a supervening decision alters settled law. A defendant clearly has no duty to object to a jury instruction that is based on firmly established circuit authority. He cannot be said to have "forfeited a right" by not making an objection, since at the time of trial no legal right existed. If we were to penalize defendants for failing to challenge entrenched precedent, we would be insisting upon an omniscience on the part of defendants about the course of the law that we do not have as judges. Imposing such a duty would only encourage frivolous objections and appeals. When the source of plain error is a supervening decision, the defendant has not been derelict in failing to object at trial, and there is thus no cause to shift the burden of proving prejudice to the defendant. In this special context, as in harmless error review under Rule 52(a), the government must show that the error did not affect the defendant's substantial rights.

Viola, 35 F.3d at 42.

Nonetheless, I believe that the government has demonstrated that the failure to instruct on materiality did not affect

Gilbert's substantial rights, i.e., the outcome of his trial. If the 1993 jury had been instructed on materiality, it would have been told that it could not convict Gilbert of perjury unless it determined that the allegedly false statements he made during his 1990 trial for participating in a RICO conspiracy to launder money could have affected the trial verdict. *See United States v. Dennis*, 786 F.2d 1029, 1041 n.15 (11th Cir.1986) (defining "materiality"). The allegedly false statements made by Gilbert during the 1990 trial were that he had not known that boxes he delivered contained cash and that he had not authorized a $15,000 wire transfer to Miami. In my view, had the 1993 jury been instructed on materiality, it could not reasonably have found that these statements were not material to the money laundering charge. Thus, the government has shown that Gilbert was not prejudiced by the court's failure to give the instruction.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5055

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

BENJAMIN BARRY KRAMER,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

Before EDMONDSON and BARKETT, Circuit Judges, and DYER, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is not hereby ordered and adjudged by this Court that the judgments of convictions of the said District Court in these causes be and the same are hereby AFFIRMED except as to Gilbert's convic-

tion for money laundering and the forfeiture judgment which are REVERSED.

BARKETT, Circuit Judge, specially concurred and filed an opinion.

Entered: January 16, 1996
For the Court: Miguel J. Cortez, Clerk

By: _____
Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 7/18/96

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-879-CR-ROETTGER (S)

UNITED STATES OF AMERICA,

vs.

BENJAMIN BARRY KRAMER, et al.

_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the defendant Benjamin Barry Kramer's Motion to Dismiss Counts 1, 2, 3, 26, 27, 28, 29, 31 and 45 of the Superseding Indictment on double jeopardy grounds, which was referred to United States Magistrate Lurana S. Snow, for report and recommendation. Based upon a careful review of the record in this cause, the arguments of counsel and the applicable caselaw, the undersigned concludes that this motion is frivolous and should be denied.

STATEMENT OF FACTS

The defendant Benjamin Barry Kramer (hereafter "Kramer") initially was charged in the Southern District of Illinois with conducting a continuing criminal enterprise, in violation of 21 U.S.C. §848 and conspiracy to distribute more than 1,000 pounds of marijuana, in violation of 21 U.S.C. §846. The time period alleged in each count was from in or about March, 1980 through February, 1987. The Illinois indictment charged as co-conspirators Randy Thomas Lanier, George Paul Brock, Eugene Albert Fischer, William R. Palumbo and Kay

Dee Bell. The indictment alleged that the defendants' activities occurred in the Southern District of Illinois, Kentucky, Florida, California, West Virginia, Louisiana, New York, Pennsylvania, Michigan, Indiana and elsewhere.

In 1988, Kramer was tried and convicted in the Southern District of Illinois. Pursuant to the penalty provisions of 21 U.S.C. §848(b), he was sentenced to life imprisonment without possibility of parole.

The instant indictment charges Kramer with RICO conspiracy, in violation of 18 U.S.C. §§1962(d) and 1963 (Count 1); substantive RICO, in violation of 18 U.S.C. §§1962(d) and 1963 (Count 1); substantive RICO, in violation of 18 U.S.C. §1962(c) and 1963 (Count 2); violations of the Travel Act, 18 U.S.C. §1952(a) (Counts 3-22, 24 and 26-31); making false statements on his federal income tax returns, in violation of 26 U.S.C. §7206(1) (Counts 42-44), and conspiracy to impede the Internal Revenue Service in the performance of its lawful functions, also known as a "Klein conspiracy," in violation of 18U.S.C. §371 (Count 45). The RICO conspiracy is alleged to have occurred during the period of January, 1975 through December, 1988 (when the indictment was returned), and the Klein conspiracy was alleged to have occurred from June, 1982 through December, 1988. According to the indictment, both conspiracies occurred in the southern District of Florida and elsewhere. The indictment names as co-defendants Melvyn Kessler, Jack Jerome Kramer and Michael Gilbert. The indictment does not allege any activity occurring in the Southern District of Illinois.

Kramer contends that prosecution of him on Counts 1, 2, 3, 26, 27, 28, 29, 31 and 45 will place him twice in jeopardy for the same offenses, in contravention of the Fifth Amendment to the United States Constitution. He argues that substantive RICO and RICO conspiracy are lesser included offenses of 21

U.S.C. §848(b); that RICO conspiracy is a lesser included offense of substantive RICO; and that prosecution of the offenses enumerated in the motion after conviction in Illinois is barred by the "same evidence test," the "totality of the circumstances test," and the "due diligence test." As discussed below, Kramer's memorandum of law in support of the motion is nicely written and superficially persuasive, but it simply ignores the clear holdings of the Eleventh Circuit in the area of double jeopardy.

RECOMMENDATION OF LAW

The courts uniformly have held that the double jeopardy clause protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple prosecutions for the same offense. *Albernaz v. United States,* 450 U.S. 333 (1981). The test for determining whether two offenses are the same for purposes of double jeopardy is "whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). This test applies to cases involving successive prosecutions as well s those involving simultaneous prosecutions. *Illinois v. Vitale,* 447 U.S. 410, 416 (1980).

As the court pointed out in *United States v. Phillips,* 664 F.2d 971, 1006 (5th Cir. Unit B. 1981):

> Although the *Blockburger* test has been referred to as the "same evidence" test, that standard focuses not on the evidence adduced at trial but rather on the elements of the offense charged. "If each [offense] requires proof of a fact that the other does not, the

> *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." (Citations omitted.)

The court also noted that under the *Blockburger* test, the same act or transaction may give rise to separate and distinct offenses under separate statutes. However, the *Blockburger* test sometimes is difficult to apply in complex conspiracy prosecutions. Thus,

> Although the government may not ordinarily separately prosecute a defendant for two conspiracies that are in reality the same conspiracy, or prosecute a defendant for a conspiracy or "transaction" that is part of a larger conspiracy, under the *Blockburger* test it is possible for single criminal agreement or conspiracy to give rise to distinct offenses under specific, separate conspiracy statutes.

Id., at 1007. Where the Government seeks to prosecute a defendant under two separate conspiracy statutes, the court must determine that each statutory provision requires proof of a fact that the other does not, *and* that each provision requires proof of a difference objective of the conspiratorial agreement. *Id.* citing *Albernaz, supra.*

Subsequent cases consistently have applied this test in determining whether prosecutions for separate conspiracies are permissible where the same evidence gives rise to different charges. *United States v. Watchmaker*, 716 F.2d 1459, 1467 (11th Cir. 1985); *United States v. Boldin*, 772 F.2d 719, 726-727 (11th Cir. 1985). And, under the explicit holdings of these cases, each of Kramer's double jeopardy claims must fail.

Kramer's first contention is that the RICO and RICO conspiracy charges are lesser included offenses of conducting a continuing criminal enterprise, of which Kramer was convicted in Illinois. Kramer concedes, as indeed he must, that *Phillips* specifically held that a defendant may be simultaneously prosecuted for RICO, RICO conspiracy and conducting a continuing criminal enterprise in violation of 21 U.S.C. §848. *Phillips, supra,* at 1013-1014. However, Kramer seeks to distinguish *Phillips* by arguing that the recently enacted penalty provision, 21 U.S.C. §848(b) requires proof of additional elements not addressed in *Phillips*. However, acceptance of this argument would require this Court to disregard the analysis applied by the *Phillips* court in reaching its conclusion.

The *Phillips* court reasoned as follows in determining that the RICO counts were not lesser included offenses of the §848 count:

Both the substantive RICO and RICO conspiracy counts require proof of facts and elements not required to be proved under §848, even though there is a substantial overlap in the proof offered to establish the crimes. In a substantive or conspiracy RICO prosecution, the Government must prove the existence of an enterprise that affects interstate commerce. The existence of an enterprise is an element that is separate from the element of the pattern of racketeering activity in which the enterprise engages; the enterprise is proved by evidence of a continuing organization and by evidence that the members function as a continuing unit. Mere proof of a pattern of racketeering activity, *i.e.*, commission of at least two acts of racketeering activity, is not sufficient to establish a RICO violation; there must also be proof of the existence of the enterprise itself. Section 848, by contrast, does not require proof of a RICO type enterprise. Rather §848 merely requires proof that the defendant undertook a continuing series of violations in concert or in conspiracy with five or more persons.

Proof of a §848 conspiracy does not establish proof of every fact and element necessary to show a RICO conspiracy violation. The object of a RICO conspiracy is to violate a substantive RICO provision, not merely to commit each of the predicate crimes constituting a pattern of racketeering activity. The gist of a RICO offense is that the defendant furthered a racketeering enterprise through a pattern of racketeering activity; a RICO count charges not the commission of the predicate crimes but rather the furthering of the enterprise. The object of a

> §848 conspiracy could be merely to commit the particular narcotics violations which taken cumulatively constitute a continuing series of violations.

Phillips, supra, at 1013-1014 (citations omitted). The enhanced penalty provision of §848(b) supplies no "missing element" which would affect this analysis. That section simply directs that a defendant who engages in a continuing criminal enterprise shall be sentenced to life imprisonment if:

> (1) such person is the principal administrator, organizer or leader of the enterprise or is one of several such principal administrators, organizers or leaders; and
>
> (2)(A) the violation referred to in subsection (d)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or
>
> (B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a

> substance described in section 841(b)(1)(B) of this title.

Clearly these additional requirements for imposition of the maximum penalty under §848 do not transform that statute into one which encompasses the elements of RICO and RICO conspiracy.

Kramer also asserts that RICO conspiracy is a lesser included offense of substantive RICO. Again, there is not way for Kramer to escape the explicit holding of *Phillips*, where the court states:

> A RICO *substantive* charge is not a conspiracy charge and it is axiomatic that a substantive offense is distinct from a conspiracy to commit that or another substantive offense. We hold that a RICO conspiracy count is not the same offense, for double jeopardy purposes, as a RICO substantive count.

Phillips, supra, at 1014. Clearly Kramer's argument on this issue is frivolous and merits no discussion.

Kramer also contends that the instant prosecution for substantive RICO, RICO conspiracy, violation of the Travel Act, and conspiracy to impede the Internal Revenue Service are precluded by the "same evidence test" and the "totality of the circumstances test." As discussed above, such tests simply do not exist in this Circuit (if anywhere). Moreover, the cases have specifically addressed the issue of whether the Double Jeopardy

Clause precludes prosecution for the offenses charged in the instant indictment where a defendant has been convicted of violations of 21 U.S.C. §848 or §846. *United States v. Phillips, supra* (defendant may be prosecuted for RICO conspiracy, substantive RICO and §848); *United States v. Boldin, supra* (prior conviction of conspiracy to import and to possess with intent to distribute a controlled substance does not preclude prosecution for violation of the Travel Act). See also, *United States v. Watchmaker, supra* (prior conviction for violation of the Travel Act does not preclude prosecution for RICO and RICO conspiracy).

The undersigned was not able to locate any case which holds that the Double Jeopardy Clause precludes a prosecution for conspiracy to impede the Internal Revenue Service in the performance of its lawful function where a defendant has been convicted of conducting a continuing criminal enterprise or conspiracy to distribute marijuana. This is not particularly surprising because the elements of these offenses are so different that no good faith argument can be made that the *Blockburger/Albernaz* test is satisfied. The objective of a Klein conspiracy is to defraud the United States, not to distribute illegal drugs. Clearly the Government is not barred from prosecuting Kramer on this charge.

Finally, Kramer contends that the Government cannot prosecute him in this District because it failed to exercise "due diligence." This argument is based on dicta in *Boldin, supra,*

where the court held that the defendant could be prosecuted for conducting a continuing criminal enterprise despite a prior conviction for conspiracy to possess illegal drugs with intent to distribute, in violation of 21 U.S.C. §846. [Ordinarily a prior conviction under §846 will bar a prosecution under §848 because conspiracy to possess drugs with intent to distribute is a lesser included offense of conducting a continuing criminal enterprise if the same criminal agreement is alleged. *United States v. Stricklin,* 591 E.2d 1112 (5th Cir.), *cert. denied.* 444 U.S. 963 (1979).] In affirming the appellants' convictions, the appellate court found that the "district court did not abuse its discretion in finding that the government did not in the exercise of due diligence have sufficient information to indict [the appellants] at the time of their prior prosecution for the current section 848 violations." *Boldin*, 772 F.2d at 732.

The Eleventh Circuit has not expressly determined whether a failure to exercise due diligence would ever constitute a ground for reversal, *United States v. Binker*, 799 F.2d 695, 696 (11th Cir. 1986), and it does not appear that the facts of the instant case warrant the creation of a new rule of law. The instant indictment was returned less that four months after the arrest of Kramer on the Illinois indictment; there are three defendants named in this case who were not charged in Illinois, and the activities alleged in this indictment all occurred outside the Southern District of Illinois. There simply is no precedent for dismissing the indictment on the ground that all

charges against Kramer should have been included in a single indictment in any one particular district.

The caselaw which binds this Court clearly indicates that there is no double jeopardy bar which precludes prosecution of Kramer on any count in the indictment. The gist of Kramer's motion is that prosecution in this district is "overkill" given the fact that the defendant has been sentenced to life imprisonment without parole. Although this reasoning has some appeal in light of the heavy caseload under which we all must labor, if carried to its logical conclusion a serial killer could be tried and convicted for only one murder. It is not the role of this Court to interfere with the prosecutorial discretion lawfully vested with the Attorney General in the absence of a constitutional mandate to do so.

CONCLUSION

This Court having considered carefully the pleadings, arguments of counsel, and the applicable case law, it is hereby

RECOMMENDED that the defendant Benjamin Barry Kramer's Motion to Dismiss Counts 1, 2, 3, 26, 27, 28, 19, 31 and 45 of the Superseding Indictment be denied as frivolous.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with The Honorable

Norman C. Roettger, United States District Judge. Failure to file objections timely shall bar the parties from attaching on appeal factual findings contained herein. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 10th day of October, 1989.

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UNITED STATES MAGISTRATE
LURANA S. SNOW